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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-540

CITY OF CHICAGO, A MUNICIPAL CORPORATION, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, COMMISSIONER OF THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANCIS J. MCCONNELL,
RICHARD P. CAMPBELL,
MARK F. LEOPOLD,
Attorneys for Respondent.

MCCONNELL & CAMPBELL,
Suite 4000,
135 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Respondent, Dixie Dairy Company, plaintiff in the district court, and appellee below, prays this Court not to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on August 6, 1976.

ISSUE PRESENTED FOR REVIEW.

Whether the City of Chicago may deny an Indiana dairy the opportunity to sell admittedly wholesome milk in Chicago by insisting on continuing, duplicative inspections of that dairy's plant and producer sources even though, as the trial court found, and the Court of Appeals affirmed, Chicago's health interests are fully and adequately protected by Indiana and United States Public Health Service inspection of that plant and those producers.

COUNTERSTATEMENT OF THE CASE.

Petitioners' statement of the case regrettably contains several important misstatements and omits other facts, thereby necessitating a counterstatement.

First, at page 8, Chicago states that its city ordinance requires that Chicago inspect all farms and milk plants, wherever located. Actually, Section 154-19 of the ordinance, quoted in the Petition, permits milk to be sold in the city if produced under provisions identical with the Chicago code and approved by the Board of Health. Testimony established, however, that the Board has interpreted Section 154-19 as applicable only in emergency situations. The Board of Health policy, and not the ordinance, requires Chicago inspection.

Second, the City's statement at page 12 of its brief that Dixie has not sought a City of Chicago permit since 1955 is patently false, as Judge Perry specifically found (Findings[1] 4 and 19, App. 2a and 12a). Indeed, the instant suit followed by less than a year the City's latest denial, in 1969, of a permit to Dixie. Dixie first applied for a milk permit in 1955 by submitting hundreds of application forms on its own behalf and on behalf of

1. Judge Perry's Finding of Facts are hereinafter referred to as "Findings ....," Appendix page references are to the Appendix contained in the City of Chicago's Petition for Writ of Certiorari, and are hereinafter referred to as "App. ....".

each of its producers to the Chicago Board of Health. Dixie was then informed that the forms had been changed, and it would have to reapply. Dixie did reapply, but Chicago simply took no action and returned the forms. Between 1955 and 1969 Dixie officers had several conversations with Board of Health personnel, but in each instance were discouraged from seeking a permit. In 1969, after Indiana had adopted the United States Public Health Service (U. S. P. H. S.) Model Milk Ordinance, Dixie again sought a permit. Dixie personnel met with Chicago officials and requested a permit based on Indiana and U. S. P. H. S. inspection of Dixie's milk. At that meeting, Mr. Meany, Chief Sanitarian for the Chicago Board of Health, told Dixie that its application would be "futile" because there was currently pending before a committee of the City Council a bill to permit reciprocal inspection and no action could be taken until passage of the bill. That bill remains in committee today.

Third, Chicago's statement of the case glosses over the fact that when Chicago sought court permission to inspect Dixie's plant and producers as a matter of discovery in the case, and as a result simultaneous Indiana and Chicago inspection was conducted, Chicago failed Dixie while Indiana did not. Regarding the validity of that inspection, Judge Tone could not resist observing that Chicago gave demerits to farms using clear plastic tubing which in places had become opaque because of scratches, but conceded under oath that the Chicago code permitted black rubber tubing under identical circumstances (App. 40a, n.13). Not until the eve of trial did Chicago again seek permission to inspect and it then passed Dixie in an obvious attempt to moot the lawsuit. Dixie refused the proffered permit because it would be conditioned upon Chicago's right to conduct continuing duplicative inspections.

Fourth, Chicago would have the Court believe that the discrimination issue was mooted by Chicago's offer of a permit. While it is true that after the offer of a permit Dixie could no longer allege it was the victim of discrimination, nevertheless,

both the trial and appellate courts concluded that the evidence supported Dixie's assertion that Chicago's insistence on initial and continuing on-site inspections was utilized as a device to exclude all out-of-state milk processors (Finding 17, App. 10a; Seventh Circuit Opinion, App. 36a-37a). These findings were among those which led the court to hold that Chicago's policy constituted an impermissible burden on commerce.

Finally, the last several pages of Chicago's statement attempts to establish that the additional inspection conducted by the City of Chicago Board of Health better insures the safety of the milk to Chicago residents. Both Judge Perry, and Judge Tone on appeal, found this allegation to be totally unwarranted (Finding 12, App. 8a; Seventh Circuit Opinion, App. 40a, n.13).

REASONS FOR DENYING THE WRIT.

I.

The Opinion of the Court of Appeals Is Entirely Consistent with Dean v. Madison as Well as A & P v. Cottrell.

Judge Tone's well reasoned opinion thoroughly discusses *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976), *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), and *Dean Milk Company* v. *City of Madison, Wisconsin*, 340 U. S. 349 (1951), and their relationship to the instant facts. Respondent adopts that discussion.

Initially, it is important to recognize that Judge Perry found, and the Seventh Circuit concurred, that Chicago's legitimate health interests with respect to Dixie's milk are fully protected by Indiana and U. S. P. H. S. inspection. Therefore, the City's insistence upon its own inspection as a condition to grant of a permit constitutes regulation without any health justification, and thus burdens commerce. *Hood* v. *DuMond*, 336 U. S. 525 (1949); *Milk Control Bd.* v. *Eisenberg Co.*, 306 U. S. 346 (1938). Even if Chicago had managed to establish that it had

some legitimate health interest in inspecting Dixie's milk, the method chosen, duplicative inspection, would still run afoul of the commerce clause. The law is clear that in exercising its power to protect health interests, a state or municipality must choose that reasonable alternative method of regulation which least burdens commerce. *Dean Milk Company* v. *City of Madison, Wisconsin, et al.*, 340 U. S. 349 (1951); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). In *Pike* this Court discussed the relation between the commerce clause and the reasonable, less burdensome alternative regulation rule. The Court there held that the alternative method of protecting local health interests which has *the least impact on interstate activities* is the method which must be employed. Thus, at 397 U. S. 134, 142 the Court stated:

> "If a legitimate local purpose is found, then the question becomes one of degree. And *the extent of the burden that will be tolerated will of course depend* on the nature of local interest involved, and *on whether it could be promoted as well with a lesser impact on interstate activities.*" (Emphasis supplied.)

The constitutional principle which emerges from *Pike* is clear. While a city admittedly is empowered to protect its legitimate local health interests, it may not do so in any manner it chooses, but rather must employ that means of promoting local health interests which has the "lesser impact on interstate activities."

In terms of *Pike*, it is manifest that the reasonable, alternative method of protecting Chicago's legitimate local health interests which has the "lesser impact on interstate activities" is, quite simply, for Chicago, as does the State of Illinois and every other municipality therein, to rely upon the inspection conducted by the United States Public Health Service certified Indiana sanitarians. Indeed, Mr. Meany admitted on cross-examination that reliance upon Indiana's inspection was a "reasonable, second alternative" to Chicago's own inspection (T. 346). Insistence on

duplicative inspection has not the least, but rather the maximum, impact on interstate activities. Duplicative inspection when legitimate local health interests are fully protected thus contravenes the *Pike* rule. It is therefore unconstitutional.

Chicago's reliance upon one sentence in *Dean* v. *Madison*, 340 U. S. 349 (1951) to support its alleged right to make duplicative inspections is misplaced. That sentence, which simply suggests that a reasonable non-discriminatory alternative to absolute refusal to permit the sale of milk in a city might be on-site inspection, is neither the law of that case nor the law of the land.

At issue in *Dean* v. *Madison* was the question whether a municipality may refuse to permit sale of milk within its boundaries by imposing geographic limits upon the source of such milk. The Court ruled that such refusal constituted an impermissible burden on commerce. The Court further held that a city is constitutionally required to provide reasonable, non-discriminatory alternative means whereby any milk processor who so desires may sell wholesome milk within the city. *Dean* held that a geographic limitation was not a reasonable, non-discriminatory alternative. *Dean* did not hold, nor by way of *dicta* suggest, that a municipality could insist on making its own duplicative on-site inspection where admittedly the milk was wholesome and the shipping state's inspection adequately protected local health interests. Indeed, the *Dean* Court assumed that Madison's interests were *not* adequately protected (340 U. S. 349, 359) and therefore, using the sentence relied upon by Chicago, spoke of Madison's right to conduct its own inspection. It does not follow, and *Dean* does not hold, that if Madison's health interests had been adequately protected by Illinois inspection, that Madison would nevertheless have had a right to insist on duplicative inspection. Indeed, Mr. Justice Black pointed out in dissent that the *Dean* holding meant that if it could be shown that Madison's health interests were adequately protected by Illinois inspection, Madison would be required to rely on that

inspection because it was the least burdensome alternative. 340 U. S. 349, 358.

Judge Tone recognized that *Dean* did not sanction duplicative inspections and quite correctly pointed to this Court's language in *Cottrell* which holds that duplicate inspection is permissible only "[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own . . ." *Cottrell*, 424 U. S. 366, 377; *Dixie*, App. at 36a. As Judge Tone observed, "if such assurance of substantial equivalence is present, the alternative of making its own inspection may not be available to the state authority." *Dixie*, App. at 36a. Such assurance was present here as both courts found. Judge Tone's opinion is obviously entirely consistent with *Cottrell*.

The City of Chicago seeks to escape this logic by arguing that *Cottrell* is not applicable because it involved an economic rather than a health dispute. There are, of course, findings here that this case too involves an economic dispute in that Chicago's policy of insisting on duplicative inspections is used as a device to deny out-of-state processors access to the Chicago market thereby protecting local union jobs (Finding 17, App. 10a). Moreover, the principles discussed in *Pike* and *Cottrell* are not limited to pure economic cases, but involve "the criteria for determining the validity of state statutes affecting interstate commerce." *Pike*, 397 U. S. 137, 142. As this Court long ago observed in *Dean* v. *Madison*, 340 U. S. 349, 354, affixing a "health" label to political activity does not immunize all action taken under the guise of that label:

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instances where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

II.

The Chicago Ordinance Burdens Interstate Commerce.

Both the District Court and the Court of Appeals found that the Chicago ordinance, as interpreted and enforced, burdens interstate commerce. That finding is overwhelmingly supported by the record.

First, the trial court found that by its administration of Chicago's milk ordinance the Chicago Board of Health has discouraged out-of-state milk producers and processors from applying for permits and, further, that Chicago does not speedily and fairly inspect out-of-state milk producers. More specifically, Judge Perry found that Chicago's duplicative inspection policy not only discouraged out-of-state processors from pursuing applications, but also that no out-of-state processor held such a permit (Finding 17, App. 10a). The evidence amply supports this finding. The portion read from Mr. Hewes' deposition reveals that not a single out-of-state pasteurizing plant held a permit to sell its milk in Chicago before this lawsuit was filed (T. 387-388).[2]

The evidence further reveals that not one of the requests by an out-of-state processor received by the Board of Health in the past two years has resulted in issuance of a permit (Finding 17, App. 10a; PX 60). Moreover, Mr. Meany testified that while 25 to 40 inquiries concerning a permit are received by Chicago each year, when told that continuing on-site Chicago inspections are required, "not very many" applicants follow through. None of those are granted permits.

Dixie's experience corroborates the charge that Chicago has burdened commerce by refusing permits to out-of-state dairies. In 1955, after months of preparation, Dixie shipped nearly

2. Three plants physically located in Wisconsin held permits. However, all were branch plants owned by Chicago dairies (Dean, Hawthorn Mellody and Borden) who maintained their principal plants in Illinois.

400 forms and applications to Chicago seeking a permit. No action was taken and the forms were simply sent back in the same box (T. 271-272). In 1969 Mr. Anderson was told by Mr. Meany that it would be "futile" for Dixie to apply for a permit because a new Chicago milk ordinance which was then in committee would soon be enacted (T. 283-284). That ordinance remains in committee today, seven years later. Only after Dixie filed suit, in an obvious effort to abort this litigation, did Chicago inspect and pass Dixie.

Second, Judge Perry found that Chicago's policy of insisting upon its own inspections results in substantial delays before the Chicago Board of Health acts with respect to a permit application (Finding 19, App. 12a). The evidence with respect to Dixie's experience, just detailed, supports this finding.

Third, Judge Perry found that Chicago's insistence on its own inspection would have a seriously adverse effect on Dixie's relationship with its producers in that it may cause producers, who are already subject to Indiana inspection and U. S. P. H. S. audit, to refuse to sell their raw milk to Dixie (Finding 16, App. 10a). Mr. Eskilson, Dixie's president, testified that his producers would quickly tire of confusingly different applications and interpretations of essentially identical standards, and that he believed that his producers might leave him to serve a dairy which is not subject to duplicative inspection (T. 275-278).

Mr. Kjos, Dixie's fieldman for 25 years, testified that in his opinion, based on conversations with Dixie's producers, "the majority" of those producers would leave Dixie and "seek another market" should they be required to submit to duplicative inspections (Finding 16, App. 10a). The result would be that Dixie's production will be significantly curtailed. Chicago offered no testimony to refute Mr. Eskilson or Mr. Kjos.

Finally, Chicago's contention that unnecessary duplicative inspection does not burden commerce because it is free is absurd. As we have seen, duplicative inspection is "free" only in the

monetary sense. Moreover, any regulation of commerce unsupported by local police power needs "burdens" commerce. A municipality is simply without power to regulate commerce absent a police power justification. Regulation without right is burdensome, free or not.

The foregoing overwhelmingly establishes that the evidence justifies Judge Perry's findings that Chicago's policy has, as a matter of fact, burdened commerce.

III.

The Opinion of the Court of Appeals Is Amply Supported by the Evidence.

This was a bench trial. After a week of hearings the court entered lengthy Findings of Fact. The Court of Appeals reviewed those findings and found them, without exception, amply supported in the record (App. 39a). The City's argument that the drinking cups alone require a reversal is patently absurd, especially in view of the fact that upon the re-inspection, *Chicago passed Dixie's farms!* At the time of the second inspection, there had been no changes in the drinking cups.

IV.

Reciprocity Is Not Mandated by the Court of Appeals Decision.

The City of Chicago argues that the decision of the court below requires the City to accept reciprocity. Such, of course, is not the case. Dixie did not seek to force the City to adopt reciprocity, nor does Judge Tone's opinion require such acceptance. Dixie merely requested that it not be subjected to duplicative inspections when admittedly its milk was wholesome. Moreover, Dixie contended, and the proof established, that milk inspected by any jurisdiction (here Indiana) which has adopted the PMO and has entered into the cooperative program with the U. S. P. H. S. is wholesome and perfectly safe to drink.

Therefore, Chicago's health interests are adequately protected by existing Indiana and U. S. P. H. S. inspection, and Chicago's refusal to allow that milk to be sold in Chicago except upon Chicago inspection is unreasonable and thus burdens commerce. Under these conditions, as this Court observed in *Cottrell*, it is the Commerce Clause which creates the necessary reciprocity.

CONCLUSION.

The decision of the Court of Appeals holding the City of Chicago milk inspection ordinance unconstitutional is consistent with this Court's prior decisions and is supported by the evidence. Petitioners have not shown any reason which calls for the exercise of this Court's powers of supervision. The Petition should be denied.

Respectfully submitted,

FRANCIS J. MCCONNELL,
RICHARD P. CAMPBELL,
MARK F. LEOPOLD,
Attorneys for Respondent.

MCCONNELL & CAMPBELL,
Suite 4000,
135 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.